85-306 (1)

No.

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1985

DUNCAN K. ROSS, JIMMY L. ROSS, HALL A. KOONTZ, MATT M. MACEK, JR. and MARY P. MACEK,

Petitioners,

vs.

JAMES W. BOWKER, and The BOARD of REVIEW for the CITY of CEDAR RAPIDS, IOWA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

THOMAS J. WILKINSON, JR.,
630 Higley Building
Cedar Rapids, IA 52401
(319) 366-4990
Counsel for Petitioners

DAVID F. McGUIRE
Counsel of Record,
Office of City Attorney
2nd Floor, City Hall
Cedar Rapids, IA 52401
(319) 363-2601

July 30, 1985

The Scheffer Press, Inc.—(312) 263-6850

26pp

Questions Presented

1. Does the Iowa Supreme Court and the Iowa Court of Appeals interpretation of Section 441.38 of the Iowa Code deny equal protection of the law to the citizens of Cedar Rapids, Iowa?

2. Were the Taxpayers' rights to equal protection violated by the voluntary actions of the Chairman of the Board of Review who was unavailable for service?

3. Does the Iowa Court of Appeals and Iowa Supreme Court's narrow reading of 441.38 deny substantive and procedural due process to the citizens of Cedar Rapids, Iowa?

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Statutory and Constitutional Provisions Involved 2

Statement 3

Reasons for Granting This Writ 6

Conclusion 7

Appendix

Ruling of the Supreme Court of Iowa of May 3, 1985 ..... 1a

Ruling of Iowa Court of Appeals of March 18, 1985 ..... 2a

Opinion and Judgment of Iowa Court of Appeals of February 26, 1985 ..... 3a

Ruling of the Iowa District Court in and for Linn County of November 16, 1983 ..... 10a

Table Of Cases

Cases relevant to the issues, but not necessarily cited in this Petition.

Armstrong Tire & Rubber Co. v. *Kubli* 312 N.W.2d 60 (Iowa 1981)

BHC Co. v. *Board of Review of Cedar Rapids* 351 N.W.2d 523 (Iowa 1984)

Bey v. *State* 402 A.2d 362 (S. Ct. Dela 1979)

Board of Directors v. *Cherokee County Bd. of Ed.* 149 N.W.2d 304 (Iowa 1967)

Cowell v. *All-American, Inc.* 308 N.W.2d 92 (Iowa 1981)

Cowles Communications, Inc. v. *Board of Review of Polk County* 266 N.W.2d 626 (Iowa 1978)

Economy Forms v. *Potts* 259 N.W.2d 787 (Iowa 1977)

Farmers' State Sav. Bank of Fairbank v. *Town Council of Fairbank, et al* 199 Iowa 1275, 202 N.W. 80 (1925)

Frost v. *Board of Review of Oskaloosa* 113 Iowa 547 (1901)

Grundon Holding v. *Board of Review of Polk County* 237 N.W.2d 755 (Iowa 1976)

Hawkeye Lumber Co. v. *Board of Review of Oskaloosa* 116 Iowa 504 (1913)

Hill v. *Hawes* 320 U.S. 520, 64 S. Ct. 334, 88 L.Ed. 253, 149 A.L.R. 736 rehearing den. 321 U.S. 801, 64 S. Ct. 515, 88 L.Ed. 1088 (1944)

Independent School District of Danbury v. *Christiansen* 242 Iowa 964, 969, 49 N.W.2d 263, 267 (1951)

Mazzoli v. *City of Des Moines* 63 N.W.2d 218 (Iowa 1954)

Midwestern Realty Co. v. *City of Des Moines* 210 Iowa 942, 231 N.W. 459 (1930)

O'Donnell v. *State* 106 N.W. 18 (Wis. 1906)

Picray v. *City of Des Moines, Iowa* 348 N.W.2d 645 (Iowa App. 1984)

Rostosky v. *Commonwealth, Dept. of Env. Resources* 264 A.2d 761 (Penn. 1976)

Smythe v. *Bissell* 20 N.E. 263 (Ind. 1889)

Statutory and Constitutional Provisions

Code of Iowa, Chapter 441, especially Section 441.38
Iowa Constitution, Article 5, Section 1 U.S. Constitution, Amendment XIV, Section 1

Text Books

4 Am.Jur.2d 787

63 Am.Jur.2d 789, 790, 793

4A CJS Appeal & Error, Section 453, pp. 129-131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

DUNCAN K. ROSS, JIMMY L. ROSS, HALL A. KOONTZ, MATT M. MACEK, JR. and MARY P. MACEK,

Petitioners,

vs.

JAMES W. BOWKER, and The BOARD of REVIEW for the CITY of CEDAR RAPIDS, IOWA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Ross, et al, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa entered in the above entitled case on May 3, 1985.

Opinions Below

The ruling of the Supreme Court of Iowa is unreported and is printed in the Appendix hereto, infra, page 1a. The ruling of the Iowa Court of Appeals is unreported and printed in the Appendix hereto, infra, page 2a. The judgment and opinion of the Iowa Court of Appeals is printed in the Appendix hereto, infra, page 3a. The ruling of the Iowa District Court in and for Linn County is printed in the Appendix hereto, infra, page 10a.

Jurisdiction

The judgment of the Iowa Court of Appeals was entered on February 26, 1985. A timely petition for rehearing by Iowa Court of Appeals was denied on March 18, 1985 (Appendix, infra, page 2a). A timely application for further review of the Iowa Court of Appeals decisions was overruled and denied by the Iowa Supreme Court on May 3, 1985 (Appendix, infra, page 1a). The jurisdiction of the Court is invoked under 28 USC 1257, paragraph 3.

Statutory and Constitutional Provisions Involved

1. Code of Iowa, Section 441.38.

> Appeal to District Court. Appeals may be taken from the action of the Board of Review with reference to protests of assessment, to the District Court of the County in which such Board holds its sessions *within twenty days after its adjournment.* No new grounds in addition to those set out in the protest to the Board of Review as provided in Section 441.37 can be pleaded, but additional evidence to sustain said grounds may be introduced. The assessor shall have the same right to appeal and in the same manner as an individual taxpayer, public body or other public officer

as provided in Section 441.42. *Appeals shall be taken by a written notice to that effect to the Chairman or presiding Officer of the Board of Review and served as an original notice.* (emphasis supplied)

2. The Constitution of the United States of America, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

This is an Application for Writ of Certiorari asking for relief from a final judgment of the Iowa Supreme Court.

The applicants herein ("Taxpayers") had all petitioned the Board of Review of the City of Cedar Rapids ("Board of Review") to review real estate assessments made in connection with real estate that they owned. The Board of Review considered their requests for adjustment of the assessed values made. On June 15, 1983, the Board of Review adjourned and mailed notices of its decisions to various taxpayers including these Taxpayers.

Section 441.38 of the Iowa Code requires that in order to perfect an appeal under that Section, notice must be served on the Chairman twenty days after the adjournment of the Board.

On Thursday, June 30, 1983 and Tuesday, July 5, 1983 Taxpayers filed their respective Petitions and Notices of Appeal and these were all filed in the office of the Clerk of Court for the Iowa District Court in Linn County. The Petitions and Notice were also delivered to the office of the Sheriff of Linn County on July 5, 1983. The Sheriff's office was made aware of the importance of the fact that these documents be served on Mr. Bowker, the Chairman of the Board of Review, on that day, July 5, 1983. Employees of the Sheriff's office indicated to the Taxpayers' attorneys that they knew the documents should be served on that day.

Counsel for the Taxpayers contacted the Chairman of the Board of Review's office on July 5 and were assured by personnel there that the Chairman would return on the last day of the twenty-day period, thus making application for substituted service unnecessary. The undersigned counsel had lunch on July 5, 1983 with a board member who indicated that the chairman would return to his office that day. In addition, the Taxpayers' Counsel were told by personnel at the Chairman's office when the Chairman would return, and it was these statements which resulted in the Chairman not being served. The Chairman was the presiding officer of the Board of Review and no other person had been named by the Board to serve in his absence. Due to the Chairman's unavailability for service within the last five days of the twenty-day limitation period, the District Court upheld the Board's special appearance which denied the Taxpayers their right to appeal the assessment of their property.

The applicants herein appealed to the Iowa Court of Appeals from a ruling made by the Honorable Thomas M. Horan, Judge of the Sixth Judicial District of Iowa, made

and entered in a consolidated case pending in the District Court of Iowa in and for Linn County, sustaining a special appearance by the Board of Review. The special appearance filed by the Board of Review contested the jurisdiction of the Court only and stated that the Court was without jurisdiction for the reason that the appeals were not taken within twenty days of the adjournment of the Board of Review as provided by law. The Taxpayers resisted the special appearance and stated that their appeal was taken and perfected within twenty days of adjournment of the Board of Review and that the Court had jurisdiction.

The Taxpayers believe that they are being denied equal protection of the laws as guaranteed by the Fourteenth Amendment to the U.S. Constitution. In addition, the Taxpayers believe that they are being denied due process of law as guaranteed by the same constitutional provision. These issues were raised in the Taxpayers' brief filed in the Supreme Court of Iowa and were reviewed by the Iowa Court of Appeals in making their decision. The Iowa Court of Appeals specifically found that the Taxpayers were not denied equal protection because all taxpayers in the Cedar Rapids area were treated the same (Appendix, infra, page 7a). It is this denial of equal protection and due process which is the Taxpayers' asserted basis for Federal jurisdiction of this matter, because assumably taxpayers in other parts of Iowa other than Cedar Rapids were able to perfect appeals by serving their respective Board of Review Chairmen during the twenty-day limitation period. The taxpayers of Cedar Rapids were not able to do this because of the Chairman's absence from the jurisdiction.

Reasons for Granting This Writ

The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws". Sections 441.21 et seq. of the Iowa Code sets forth a complex scheme by which real property is to be valued and taxed. As noted, Section 441.38 deals specifically with appeals from Board of Review decisions to the District Court. The actions of the Chairman of the Board of Review of Cedar Rapids, who voluntarily made himself unavailable for service as required by this statute and made no arrangements for alternative service, cannot be allowed to shorten the appeals period for residents of the City of Cedar Rapids wishing to appeal. The end result is a denial to residents of Cedar Rapids of equal protection of the law. Assumably, residents of Des Moines or Waterloo who gave notices of appeal to their respective Sheriffs on July 5, 1983 were able to have those notices served on July 5, 1983. If so, they would have had the true right of the twenty-day time limit set forth in Section 441.38, not the mere theoretical right which was provided residents of Cedar Rapids.

Taxpayers believe that this Writ should be granted because the Iowa Courts have denied them equal protection of the law on a very narrow and technical point. In fact the decision of the Iowa Court of Appeals is extremely illogical and unfair. To assert that equal protection of the law of the State of Iowa requires only that all taxpayers in the Cedar Rapids area are treated the same, without giving consideration to treatment of taxpayers in the rest of the State, is a gross misreading of the Fourteenth Amendment.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. WILKINSON, JR.,
630 Higley Building
Cedar Rapids, IA 52401
(319) 366-4990
Counsel for Petitioner

DAVID F. MCGUIRE
Counsel of Record,
Office of City Attorney
2nd Floor, City Hall
Cedar Rapids, IA 52401
(319) 363-2601

Appendix

IN THE SUPREME COURT OF IOWA

No. 84-162

DUNCAN K. ROSS and JIMMY L. ROSS, et al.,
Appellants,

vs.

BOARD OF REVIEW OF THE CITY OF CEDAR RAPIDS, et al., Appellees.

ORDER

Plaintiffs-appellants' application for further review is hereby overruled and denied after consideration by this court en banc.

Dated this 3rd day of May, 1985.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson
W. W. Reynoldson, Chief Justice

Copies to:

Thomas J. Wilkinson, Jr.
630 Higley Building
Cedar Rapids, IA 52401

Phillip D. Klinger
401 Old Marion Rd. NE
Cedar Rapids, IA 52402

F. James Bradley
100 First Street SW
Cedar Rapids, IA 52404

David F. McGuire
City Attorney
2nd Floor City Hall
Cedar Rapids, IA 52401

IN THE COURT OF APPEALS OF IOWA

No. 84-162

DUNCAN K. ROSS and JIMMY L. ROSS, et al.,
Plaintiffs-Appellants,

vs.

BOARD OF REVIEW OF THE CITY OF CEDAR RAPIDS, et al.,
Defendants-Appellees.

ORDER

(4-514)

Appellants' petition for rehearing pursuant to Supreme Court Rule 3.5 is denied.

Done this 18th day of March, 1985.

/s/ Leo Oxsberger
Leo Oxberger, Chief Judge

copies to:

Phillip D. Klinger
401 Old Marion Road, N.W.
Cedar Rapids, IA 52402

Thomas J. Wilkinson, Jr.
830 Higley Bldg.
Cedar Rapids, IA 52401

F. James Bradley
100 First St. S.W.
Cedar Rapids, IA 52404

David F. McGuire
City Attorney
City Hall
Cedar Rapids, IA 52401

IN THE COURT OF APPEALS OF IOWA

DUNCAN K. ROSS and JIMMY L. ROSS, et al.,
Plaintiffs-Appellants,

vs.

BOARD OF REVIEW OF THE CITY OF CEDAR RAPIDS, et al.,
Defendants-Appellees.

Filed February 26, 1985

4-514

84-162

Appeal from the Iowa District Court for Linn County —Thomas M. Horan, Judge.

Plaintiff property owners bring a consolidated appeal from the order sustaining defendants' special appearance in an action challenging property tax assessments.

AFFIRMED.

Thomas J. Wilkinson, Jr. of Terpstra, Wilkinson & Van Horne, Cedar Rapids, Phillip D. Klinger of Klinger, Robinson & McCuskey, Cedar Rapids, and F. James Bradley of Bradley & Riley, Cedar Rapids, for plaintiffs-appellants.

David F. McGuire, City Attorney, Cedar Rapids, for defendants-appellees.

Heard by Oxberger, C.J. and Donielson and Snell, JJ.

PER CURIAM

Plaintiff property owners were aggrieved by a real estate assessment decision of the board of review, which adjourned on June 15, 1983. Petitions and notices of appeal to district court were filed within the twenty-day appeal period provided by statute. The chairman, James Bowker, left town on July 1 for vacation. Counsel for the taxpayers contacted Bowker's office and was told that he would return on July 5, the last day of the twenty-day period. On the last day, notice was delivered to the sheriff with instructions stressing the importance of immediate service upon the board chairman.

Unaware of the taxpayers' attempts to locate him, Bowker did not return on the 5th. On July 6, the sheriff's office succeeded in locating Bowker at the cabin where he was staying in northeast Iowa. Bowker indicated he would pick up the documents on July 7, but did not actually do so until July 8.

Relying on *Economy Forms Corp.* v. *Potts,* 259 N.W.2d 787 (Iowa 1977), the district court sustained defendants' special appearance on the ground that service had not been accomplished within twenty days as required by Iowa Code section 441.38.

On appeal, the taxpayers assert that delivery to the sheriff tolled the twenty-day limitations period; that they substantially complied with the statute; that the district court's holding operates to deny them due process and equal protection; and that Mr. Bowker had a duty to make himself available for service.

The controlling case in Iowa on the issue of timeliness of service in appeals in tax assessment cases is *Economy Forms Corp.* v. *Potts,* 259 N.W.2d 787 (Iowa 1977). That case dealt with the district court's jurisdiction when notice of appeal is not filed within twenty days of adjournment of the tax assessment board. The court's analysis in that case began by recognizing that the district court's

jurisdiction of assessment board appeals cases is not original but rather is wholly statutory. *Id.* at 788. The statute requires:

> Appeals may be taken from the action of the board of review with reference to protests of assessment, to the district court of the county in which such board holds its sessions within twenty days after its adjournment. . . . . Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the board of review and served as an original notice.

Iowa Code §441.38 (1983).

The court went on to state that Iowa Rules of Civil Procedure 48 to 55 are not applicable to appeals to the district court from the board of review. *Id.* These rules, the court stated, "establish procedures for commencement of original actions in district court, and an appeal from a decision of the board of review is not an original action. Moreover, the procedure for conferring jurisdiction of an assessment appeal on the district court is specifically provided for in § 441.38." *Id.* This statute requires that notice be served before the expiration of the twenty-day period. The phrase "as original notice" which is used in § 441.38 prescribes the method of service and authorizes service as provided by rule 56.1 I.R.C.P.

I. Delivery to the Sheriff. In arguing that delivery to the sheriff tolled the twenty-day limitations period, taxpayers rely on *Grundon Holding* v. *Board of Review of Polk City,* 237 N.W.2d 755 (Iowa 1976). They cite this for the premise that delivery to the sheriff within seventeen days after adjournment was timely although actual service was not made until twenty-one days after adjournment. In *Grundon,* there was no specific finding of when the board adjourned. The court did not specifically address the question of whether delivery to the sheriff was sufficient. Rather, the court noted that the specific date of adjournment was unclear and assumed for purposes of

the case that the board had adjourned on June 23, 1969. The court then stated that delivery to the sheriff was made on July 10, 1969, and service was completed on July 14, 1969. The court concluded by saying: "Even if the Board adjourned on the day the protest was denied, notice of appeal was timely under the statute." *Grundon Holding*, 237 N.W.2d at 757. We reject the taxpayers' claim that the *Grundon Holding* finding that delivery of notice to the sheriff within the time period is controlling in view of the following facts: the court in *Grundon Holding* did not specifically address the issue of whether delivery to the sheriff itself was sufficient to toll the statute of limitations; in *Grundon Holding* there was no specific finding of when the board adjourned; and July 13, 1969, was a Sunday as noted by the trial court in this case, so delivery on the 14th would have been timely.

II. Substantial Compliance. We find that *BHC Co.* v. *Board of Review of Cedar Rapids*, 351 N.W.2d 523 (Iowa 1984), controls the question of whether the taxpayers have "substantially complied" with Iowa Code section 441.38. This exact issues was raised in *BHC*, and the Iowa Supreme Court held:

> Plaintiff also argues that, even if old rule 49 does not apply in this case, its efforts on June 5 nevertheless "substantially complied" with a notice requirement to section 441.38. When the same contention was raised in condemnation appeals we rejected it as follows:
>
> > As a result of appellants' failure to serve notice of appeal in substantial compliance with the statute the court did not have jurisdiction of the parties. The effect of a contrary holding would be to extend the time within which an appeal may be taken. This we cannot do.
>
> We adhere to the same view here.

BHC Co., 351 N.W.2d at 526 (citations omitted).

III. Constitutionality. Taxpayers challenge the constitutionality of the tax assessment statute on the grounds that it denies them due process and equal protection. In *McLeland* v. *Marshall County*, 199 Iowa 1232, 201 N.W. 401, (1925), the Iowa Supreme Court faced a challenge to a tax statute which governed the appropriation of fees collected under a motor vehicle license act. On the question of the constitutionality of the statute, the court stated:

> A party is not deprived of his property without due process of law by the enforced collection of taxes merely because, in individual cases, it works hardships or imposes unequal burdens. *Kelly* v. *Pittsburg*, 104 U.S. 78. If a tax is for a public purpose, as distinguished from a private purpose, it will be upheld by the courts, and will not amount to the taking of private property without due process of law. *Green* v. *Frazier*, 253 U.S. 233; *Jones* v. *City of Portland*, 245 U.S. 217.

McLeland, 199 Iowa at 1243-44, 201 N.W. at 405.

In this case, the hardship is not permanent. The taxpayers can challenge the board's assessment next year. We find that they were not denied equal protection because all taxpayers in the Cedar Rapids area were treated the same. Although this statute may result in some inequality and hardship on the taxpayers, we decline to find it unconstitutional.

IV. Duty to be Available for Service. Taxpayers argue that Mr. Bowker had a duty to make himself available for service and that by leaving town he violated this duty. Bowker did not intentionally absent himself from the county. Rather, he was on vacation and knew nothing of the taxpayers' attempts to contact him. Although the taxpayers were told that Bowker was to be back on July 5, the twentieth day, we cannot accept his failure to return as an excuse for extending the twenty-day period. The supreme court's holding in *BHC* v. *Board of Review of Cedar Rapids*, 351 N.W.2d 523, 525 (Iowa 1984), compels

such a finding. In that case, the supreme court concluded with the following statement:

> Finally, plaintiff asserts that this case requires reversal as a matter of "public policy." It asserts it would be extremely unjust if a defendant were able to avoid a lawsuit by ". . . being unavailable for service during critical times." The assertion is misplaced. In *Cunningham* v. *Iowa Department of Job Service*, 319 N.W.2d 202, 206 (Iowa 1982) we said: "Jurisdiction does not attach, nor is it lost, on equitable principles. It is purely a matter of statute."
>
> We do not suggest, if the case were subjected to an equitable balance, plaintiff would prevail. The Iowa rules of civil procedure clearly provide a method, under rule 56.1(n), of serving notice if the proper official is not available. This procedure was used in *Cowles*, 266 N.W.2d at 627-28.
>
> We note, too, even if the board's assessment is erroneous, plaintiff is harmed for only one year. *See Farmers Grain Dealers Association* v. *Woodward*, 334 N.W.2d 295, 298 (Iowa 1983). Finally, there is a compelling reason for adhering to procedural rules:
>
> > It is not for us to regret that we have been compelled to follow a strict and technical line in our decision set out above. The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass. We have, and should have, no compunction in following them when they are clear and definite.
>
> *Esterdahl* v. *Wilson*, 252 Iowa 1199, 1208, 110 N.W.2d 241, 246 (1961).

BHC, 351 N.W.2d at 526. The procedure for petition for alternative service when the board chairman is unavailable is set forth in *Cowles Communications, Inc.* v. *Board of Review of Polk City,* 266 N.W.2d 626, 632 (Iowa 1978). Because this procedure was available to the taxpayers and in view of the supreme court's holding in *BHC,* we find that the trial court acted properly in sustaining the special appearance. The ruling by the trial court is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, *C.J.,* (dissenting).

I believe the plaintiffs here have substantially complied with Iowa Code section 441.38. The majority indicates *BHC Co.* v. *Board of Review of Cedar Rapids,* 351 N.W. 2d 523 (Iowa 1984), controls here. That case indicated that compliance was not substantial when the sheriff was given papers to serve the board chairman on the last day for appeal, and the chairman could not be located until the twenty-first day following the board's adverse decision. *Id.* at 523-24. However, in this case, unlike *BHC,* counsel for plaintiffs contacted the chairman's office and was assured by personnel there that the chairman would return on the last day of the twenty-day period.

I believe this case can be distinguished from *BHC* on this basis. Plaintiffs had a right to rely on the statements made by officials at the chairman's office that he would return July 5. The court in *BHC* noted, "Untimely service by an officer, wrong service, or no service at all are hazards which attend eleventh-hour attempts to serve." *Id.* at 525 (citation omitted). Plaintiffs were told by personnel at the office when the chairman would return, and it was this staement, not the eleventh-hour attempt to serve, which resulted in the chairman not being properly served.

I would reverse the special appearance.

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

DUNCAN K. ROSS and
JIMMY L. ROSS,
MATT M. MACEK, JR. and
MARY P. MACEK,
HALL A. KOONTZ,
Plaintiff-Appellants,

EQ 7091, EQ 7092,
EQ 7096, EQ 7097,
EQ 7098, EQ 7101.

vs.

THE BOARD OF REVIEW OF THE CITY OF CEDAR RAPIDS, et al., JAMES W. BOWKER, Chairman of the Board of Review for the City of Cedar Rapids, Iowa, et al.,
Defendant-Appellees.

RULING ON SPECIAL APPEARANCE

Hearing was held on defendants' Special Appearance on November 2, 1983. Plaintiffs appeared by Attorneys Jeffrey D. Hupert, Thomas J. Wilkinson, Jr., and Phillip D. Klinger. Defendants appeared by Cedar Rapids City Attorney David M. McGuire.

Plaintiffs own property and were aggrieved by defendant Board's assessment of that property. The Board adjourned on June 15, 1983, having assessed plaintiffs' property. Plaintiffs desire to appeal, a process governed by Section 441.38, the Code:

> "Appeals may be taken from the action of the Board of Review with reference to protests of assessment, to the District Court of the county in which such Board holds its sessions within twenty days of its adjournment. No new grounds in addition to those set out in the process to the Board of Review as provided in Section 441.37 can be pleaded, but additional evidence to sustain said grounds may be introduced. The assessor shall have the same right to appeal and in the same manner as an individual taxpayer, public body, or other public officer as pro-

vided in Section 441.42. *Appeals shall be taken by a written notice to that effect to the Chairman or presiding officer of the Board of Review and served as an original notice.*"

The District Court acquires appellate jurisdiction of an assessment appeal only as provided in Section 441.38, which requires that notice must be served on the chairman of the Board of Review within 20 days of the Board's decision. *Economy Forms Corp.* v. *Potts*, 259 N.W.2d 787, 788 (Iowa 1977). Merely filing a copy of the notice of appeal and delivering it to the sheriff for service within the 20-day appeal period is not sufficient. Personal service must be obtained. No provision exists in the statute or in case law for an extension of the 20-day time limit due to the chairman's absence from his normal place of residence. Plaintiffs' argument that the time limit should be extended because it was Chairman Bowker's fault that he was not timely served is not supported by case law. *Cf., In re Marriage of Mantz*, 266 N.W.2d 758 (Iowa 1978) (notice of appeal timely served and delivered to clerk of district court held not timely under Iowa R. App. P. 5 because notice was not actually filed in district court until seven days after it was delivered, by which time the mandatory time for appeal had lapsed).

Likewise, plaintiffs' reliance on *Grundon Holding Corp.* v. *Board of Review of Polk County*, 237 N.W.2d 755 (Iowa 1976) is misplaced. While it is true that the chairman was served 21 days after the board's decision in that case, the 20th day, July 13, 1969, fell on a Sunday. See Am. Jur. 2d, Desk Book, Item #178, Calendar 4. Therefore, the time for perfecting the appeal was extended to the following Monday, the 21st day. Iowa Code Section 4.1(22).

Failure to appeal within the time provided by statute is fatal to the jurisdiction of any appellate court. See *Bisenius* v. *Palo Alto County*, 256 Iowa 196, 200, 127 N.W. 2d 128 (1964).

Since the chairman of the Board of Review was not served within 20 days of the adjournment of the Board of Review, the defendants' Special Appearance is sustained. Costs taxed to plaintiffs.

Dated this 16th day of November, 1983.

/s/ Thomas M. Horan
Thomas M. Horan, Judge, Sixth
Judicial District of Iowa.

11-17-83

F. James Bradley
Jeffrey D. Hupert
Thomas J. Wilkinson, Jr.
Phillip D. Klinger
David M. McGuire - City Atty